

CJSP Selected Criminal Law Topics
OVERVIEW
of
CRAWFORD v. WASHINGTON

AUG 3, 2004
Hon. Linda R. Condon
Judge of the Santa Clara Superior Court

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Overview of *Crawford*

The U.S. Supreme Court decision in *Crawford v. Washington*, 158 L.Ed. 2d 177, 124 S.Ct. 1354 (March 8, 2004) significantly alters the landscape of hearsay evidence. Hearsay statements previously thought to survive Confrontation Clause analysis in criminal cases will be inadmissible under the Court's analysis of the history and purpose of the 6th Amendment. Unfortunately for the trial courts, an essential element of that analysis – the “testimonial” character of hearsay - is new and incompletely defined. In fact, Justice Scalia confessed the failure of his opinion to comprehensively define “testimonial” (Slip op. at 19) and the Chief Justice criticized the majority because “parties should not be left in the dark” regarding rules of criminal evidence being “applied every day in courts throughout the country.” (*see also id.* at 21))

In spite of this ambiguity, it is clear that *Crawford* requires exclusion of some hearsay California judges have previously admitted under familiar exceptions to the hearsay rule. Now it would be error to admit this evidence. Accordingly, trial judges with a criminal docket must master *Crawford*. When prosecutors offer hearsay (*Crawford* does not apply to hearsay offered by the defendant) under an apparently valid exception, judges must now determine whether *Crawford* precludes the use of that evidence. These materials briefly outline the holding in *Crawford* and recent decisions applying that rule.

Summary Of The Case

Sylvia Crawford was in the room when her husband, defendant Michael Crawford, stabbed Kenneth Lee. Sylvia later gave a statement to police that arguably undermined defendant's claim of self-defense, and also acknowledged that she had led defendant to the victim's apartment and thereby facilitated the assault. After defendant invoked the marital privilege at trial, the prosecutor offered Sylvia's statement to police as a declaration against penal interest. The trial court admitted Sylvia's taped statement over defendant's objection that it violated his right of confrontation under the 6th Amendment since he could not cross-examine Sylvia. The Supreme Court unanimously agreed and overturned Michael Crawford's conviction. Along odd lines, the Court split 7-2 about its rationale. Justice Scalia's sweeping majority opinion overruled *Ohio v. Roberts* – the Supreme Court's approach to Confrontation Clause analysis that had been law since 1980. Chief Justice Rehnquist and Justice O'Connor concurred in the judgment only and dissented from Justice Scalia's sweeping new logic.

Constitutional text

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

In reaching its decision in *Crawford*, the Court traced the history behind the Confrontation Clause, and made two conclusions about the meaning of the Sixth Amendment provision (See *id.* at 1363-66).

First, the historical record revealed that "the principal evil at which the Confrontation Clause was directed was the civil-law ... use of *ex parte* examinations as evidence against the accused." In the 16th and 17th centuries, judicial officials would routinely conduct private examinations of witnesses, and the examinations would be read into evidence against the accused at trial, despite protests by the accused for an opportunity to confront the absent accusers. The First Congress had this questionable practice in mind when it drafted the proposal that eventually became the Sixth Amendment.

The history behind the Sixth Amendment also supported a second inference: "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The prior-opportunity to cross-examine was a necessary condition for the admissibility of testimonial statements against the accused in a criminal case, and the Sixth Amendment incorporates this limitation.

The Court then explained that the legacy of *Ohio v. Roberts* (which often led to the admission of pre-trial testimonial statements based on "indicia of reliability" other than prior cross-examination), clashed with the core meaning of the Sixth Amendment, and found that test "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." The Court noted that "Reliability is an amorphous, if not entirely subjective, concept" and that "the unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."

The Rule in *Crawford*

Following this historical rationale, the Supreme Court in *Crawford* ruled that hearsay evidence must be excluded in criminal cases when:

- (1) it is offered for the truth of the matter asserted
- (2) the declarant is unavailable and the defendant did not have an earlier opportunity to cross-examine the declarant; and
- (3) the hearsay is “testimonial” in character.

Element (1) limits *Crawford*’s rule of exclusion. That exclusion applies only when a statement is offered for the truth of the matter asserted. *Crawford* does not apply when the evidence is only for some non-hearsay purpose, such as impeachment, or as a basis for an expert’s opinion. (Of course, since evidence is hearsay only when offered for the truth, this is somewhat redundant.)

Element (2) is simple but sweeping. It is usually straightforward to tell whether the defendant had an earlier opportunity to cross-examine a non-testifying declarant about the proffered statement and whether a witness is unavailable for trial. By the same token, hearsay commonly springs from situations in which cross-examination was not an option, because most of life occurs beyond the reach of this formal legal procedure. This element thus potentially bars a considerable amount of previously admissible hearsay.

Element (3) - the “testimonial” character of hearsay - is new and incompletely defined. In attempting to provide some insight, Justice Scalia did offer a range of candidate formulations about the meaning of “testimonial” drawn from briefs filed before the Court and from prior decisions:

- "ex parte in-court testimony or its functional equivalent-- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" (*Brief for Petitioner*)
- “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (*Brief for National Association of Criminal Defense Lawyers et al., as Amici Curiae*)
- “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” (*White v. Illinois* 502 US 346, 365.)

Slip op. at 10 (quotation marks and punctuation omitted).

The standard to be applied

Although Justice Scalia identified three possible formulations for the definition of “testimonial” as cited above, only the third cited appears to be entirely consistent with the definition of “testimony” adopted in that decision “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” (*Id. at 1364*) and with the specific examples it contains:

Examples of statements that **do** qualify as “testimonial:”

- Statements taken by police officers in the course of interrogations
- Ex parte testimony at a preliminary hearing. (This example about *ex parte* testimony at a preliminary hearing stems from 16th and 17th century English practice (*id. at 6*), and sounds strange in California, where cross-examination is a standard feature in modern preliminary hearings.)

Statements that are *not* “testimonial” include

- business records
- statements in furtherance of a conspiracy
- official records (taken from the Chief Justice’s concurring opinion, *id. at 22*) (it is easy to imagine some statements to officials that might be testimonial – for instance, reports written by coroners, lab technicians, or police officers who expect the report to be introduced in lieu of their testimony at trial. See, e.g., the opinions in *City of Las Vegas v. Walsh*, 2004 Nev. LEXIS 49, 120 Nev. Adv. Rep. 44 (2004) [Excluding affidavit of blood technician in DUI case]; *Perkins v. State*, 2004 Ala. Crim. App. LEXIS 87 (Ala. Crim. App. Apr. 30, 2004) and *Smith v. State*, 2004 Ala. Crim. App. LEXIS 93 (Ala. Crim. App. Apr. 30, 2004) [Admitting autopsy evidence and reports])

There are two hearsay exceptions that Justice Scalia specifically mentioned but left in some doubt. The dying declaration exception is one:

“Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are (*citations omitted*). We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.” (*Id. at 11 n.6*).

The spontaneous statement exception is another, and was the focus of a *Crawford* footnote that may add a new constitutional level of analysis for spontaneous statements, taken from an English case from 1694:

“[T]o the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made ‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’ *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694).”), (*See id. at fn.6*)

The clear departure in California from the earlier standards to a more expanded version of this hearsay exception suggests that careful examination of the facts in each case will be required. (See, e.g., *People v. Poggi*, 45 Cal3d 306 [lapse of time for victim to calm down before answering questions by police]; *People v. Farmer*, 47 Cal3d 888 [statements in response to questioning by police officers])

Crawford in California - Application to existing hearsay exceptions

As a practical matter, many forms of “testimonial” evidence are already excluded where there has been no prior opportunity to cross examine (*See E.C. §1290 et seq.*), although many other hearsay exceptions are worthy of close consideration post *Crawford*. Several are briefly mentioned below:

Evidence Code §1370. (Allowing recorded statements of threats or infliction of injury made to doctors, nurses, paramedics, or police). This rule has been frequently utilized in some domestic violence and other cases. After *Crawford*, it will be very difficult for prosecutors to use §1370 to admit statements recorded by police, although statements made to medical professionals may not necessarily be implicated.

(*See People v. Cage* (July 15, 2004 4th Dist) 2004 Cal. App. LEXIS 1121 [allowing use of declarant’s statement given to police while awaiting treatment at the hospital and before police had determined a crime had been committed; allowing use of statement made to physician who examined declarant]. For cases interpreting similar statutory exceptions under *Crawford*, see *Fowler v. State*, 2004 Ind. App. LEXIS 1103 (Ind. Ct. App. June 14) [Allowing victim statements to police “preliminary investigatory questions”]; *State v. Forrest*, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 [Spontaneous statement made to police immediately after a rescue]

Evidence Code §1360 (Allowing statements of child victims of sexual abuse or neglect). A similar analysis to that required for EC §1370 may result in the exclusion of many statements under this section, although a much greater number are likely to be non-testimonial because they are often made to family members or friends.

Evidence Code §1380 (Allowing videotaped statements of elder victims of abuse). This statutory hearsay exception is unconstitutional on its face under *Crawford*, since it requires that formality of statements (videotaped) given under police scrutiny.

(*See People v. Pirwani*, 2004 Cal.App. LEXIS 965 [“We accept the Attorney General’s concession that Evidence Code section 1380 is unconstitutional on its face”]

Evidence Code §1240 (Spontaneous statements) As noted above, cases interpreting this statutory exception in California have greatly expanded its applicability from the early common law exception. Accordingly, the question of whether such statements are testimonial in nature – particularly where they derive from police questioning – is one that will require careful examination by the trial courts.

Evidence Code §1230 (Declarations against interest) Precisely the exception at issue in *Crawford*, it is clear that these statements, when made during police interrogation, fall squarely within the prohibition of *Crawford*. However, numerous states have already concluded that such statements, when made to friends, neighbors or relatives, remain subject to the more familiar rules of admissibility – depending on indicia of reliability not limited to the right of confrontation.

Disallowed: *State v. Cutlip*, 2004 Ohio 2120, 2004 Ohio App. LEXIS 1848 (Ohio Ct. App., Medina County Apr. 28, 2004, *State v. Pullen*, 594 S.E.2d 248, 2004 N.C. App. LEXIS 585 (N.C. Ct. App. 2004) [Confession of unjoined co-perpetrator]; *United States*

v. Jones, 2004 U.S. App. LEXIS 11314 (7th Cir. Ind. June 9, 2004) [Redacted confession of unjoined co-perpetrator]; *Hale v. State*, 2004 Tex. App. LEXIS 5133 (Tex. App. Fort Worth June 9, 2004 [Written statement made during police interrogation of unjoined accomplice]; *Brooks v. State*, 132 S.W.3d 702, 2004 Tex. App. LEXIS 3711 (Tex. App. Dallas 2004) [Written confession of non-testifying co-defendant] Allowed: *People v. Cervantes*, 118 Cal. App. 4th 162 [Non-testifying co-defendants statements to neighbor]; *State v. Rivera*, 268 Conn. 351, 844 A.2d 191, 2004 Conn. LEXIS 129 (2004) [unjoined co-perpetrator's statement to his cousin]; *State v. Manuel*, 2004 Wisc. App. LEXIS 454 (Wis. Ct. App. May 27, 2004) [Unjoined co-perpetrator's statement to his girlfriend]

Evidence Code §1231 (Statements of decedent in gang prosecution) These statements, required to be under oath or affirmation or in a court proceeding under penalty of perjury are clearly testimonial within any definition of that term suggested in *Crawford*. Thus, absent a showing of prior opportunity to cross examine, or that defendant was responsible for the death of the witness, such statements appear to be inadmissible in future cases.

Evidence Code §1253 (Statements of child for medical treatment or diagnosis) Outside the category of testimonial statements in most circumstances, it is possible that a child be examined for forensic purposes (as in a SART examination), and thus application of any but the most stringent of *Crawford*'s proposed tests would probably result in exclusion.

Evidence Code §1228 (Statements of child victim to establish corpus delicti) *Crawford* applies only when statements of unavailable declarants are offered at trial for a hearsay purpose. Since statements under this evidentiary provision are offered only outside the presence of the jury (for the courts determination of admissibility of a confession), *Crawford* is not implicated.

Cases applying *Crawford*

Testimonial Hearsay Statements of Codefendants, Accomplices and Others

Guilty plea allocutions

United States v. Pandey, 2004 U.S. App. LEXIS 8844 (2d Cir. N.Y. May 5, 2004)
People v. Carrieri, 2004 N.Y. Misc. LEXIS 418, 2004 WL 877564 (N.Y. Sup. Ct. Apr. 15, 2004)
United States v. Massino, 2004 U.S. Dist. LEXIS 9733 (E.D.N.Y. June 1, 2004)

Plea minutes

People v. Carrieri, 2004 N.Y. Misc. LEXIS 418 (N.Y. Sup. Ct. Apr. 15, 2004)

Confession of unjoined co-perpetrator

State v. Cutlip, 2004 Ohio 2120, 2004 Ohio App. LEXIS 1848 (Ohio Ct. App., Medina County Apr. 28, 2004)
State v. Pullen, 594 S.E.2d 248, 2004 N.C. App. LEXIS 585 (N.C. Ct. App. 2004)
United States v. Jones, 2004 U.S. App. LEXIS 11314 (7th Cir. Ind. June 9, 2004)
Davis v. United States, 2004 D.C. App. LEXIS 200

Written statement of unjoined accomplice made during police interrogation

Hale v. State, 2004 Tex. App. LEXIS 5133 (Tex. App. Fort Worth June 9, 2004)

Written confession of non-testifying co-defendant

Brooks v. State, 132 S.W.3d 702, 2004 Tex. App. LEXIS 3711 (Tex. App. Dallas 2004)

Statement of co-conspirator during police interrogation “in furtherance of conspiracy” (plan to mislead investigation) where prima facie evidence of conspiracy not shown

State v. Cox, La. App. 04-42, 2004 La. App. LEXIS 1493

Statements of government informant in recorded phone call with defendant

States v. Hendricks, 2004 U.S. Dist. LEXIS 8855 (D.V.I. May 11, 2004)

Statements of co-defendant in police monitored phone call with defendant

State v. Hernandez, 2004 Fla. App. LEXIS 8392 (Fla. Dist. Ct. App. 3d Dist. June 16, 2004)
 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse”)

Declarant’s out-of-custody statements to prosecutor

United States v. Saner, 313 F. Supp. 2d 896, 2004 U.S. Dist. LEXIS 6293, 2004-1 Trade Cas. (CCH) P74362 (S.D. Ind. 2004)

Declarant’s statements of personal and family history during custodial interrogation (where relevant on elements of crime)

United States v. Gonzalez-Marichal, 2004 U.S. Dist. LEXIS 8979 (S.D. Cal. Mar. 29, 2004)

Prior Testimony

Deposition testimony

Liggins v. Graves, 2004 U.S. Dist. LEXIS 4889 (S.D. Iowa Mar. 24, 2004)

Preliminary hearing testimony

United States v. Avants, 367 F.3d 433, 2004 U.S. App. LEXIS 7519 (5th Cir. Miss. 2004)

Grand jury testimony

People v. Patterson, 808 N.E.2d 1159, 2004 Ill. App. LEXIS 468

Videotaped conditional examination

Jones v. Albaugh, 2004 U.S. Dist. LEXIS 4529 (S.D.N.Y. Mar. 17, 2004)

Testimonial Hearsay in Child Abuse Cases

Statement of child victim to physician member of child protection team and a frequent prosecution witness in child abuse cases

Snowden v. State, 156 Md. App. 139, 846 A.2d 36 (Md. Ct. App. 2004)

Statement made by child victim to police officer

People v. Vigil, ___ P.3d ___ (Colo. App. No. 02CA0833, June 17, 2004)

People v. Sisavath, 2004 Cal. App. LEXIS 820 (Cal. App. 5th Dist. May 27, 2004)

People ex rel. R.A.S., 2004 Colo. App. LEXIS 1032 (Colo. Ct. App. June 17, 2004)

Statements made by child victim to social services investigator

Snowden v. State, 156 Md. App. 139, 846 A.2d 36 (Md. Ct. App. 2004)

Statements of child victim to trained interviewer at child witness center (limited to facts of this case)

People v. Sisavath, 2004 Cal. App. LEXIS 820 (Cal. App. 5th Dist. May 27, 2004)

“Conceivably, the Supreme Court's reference to an “objective witness” should be taken to mean an objective witness in the same category of persons as the actual witness--here, an objective four-year-old. But we do not think so. It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.”

Testimonial Hearsay in Domestic Violence Cases

Victim statements to police who investigated prior incidents of domestic violence

Bell v. State, 2004 Ga. LEXIS 417 (Ga. May 24, 2004)

Other Testimonial Hearsay

Affidavit of blood technician (“prepared solely for prosecution’s use at trial”

City of Las Vegas v. Walsh, 2004 Nev. LEXIS 49, 120 Nev. Adv. Rep. 44 (2004)

Dying Declaration

State v. Meeks, 88 P.3d 789, 2004 Kan. LEXIS 234 (Kan. 2004)

(In response to question by first officer on scene, decedent’s statement “[defendant] shot me.”
Admitted under rule of forfeiture)

911 recording

People v. Cortes, 2004 N.Y. Misc. LEXIS 663 (N.Y. Sup. Ct. May 26, 2004)

[anonymous caller reporting ongoing crime and responding to questions]

(“The 911 call in this case was for the purpose of invoking police action and the prosecutorial process. The only use of the statements was for government intervention including judicial proceedings.”)

NON - Testimonial Hearsay Statements of Codefendants, Accomplices and Others

Statements made between co-conspirators

Diaz v. Herbert, 2004 U.S. Dist. LEXIS 8728 (S.D.N.Y. May 10, 2004)

Statements of co-conspirator made in furtherance of conspiracy

Llaca v. Duncan, 2004 U.S. Dist. LEXIS 7916 (S.D.N.Y. May 4, 2004)

United States v. Robinson, 367 F.3d 278, 2004 U.S. App. LEXIS 7231 (5th Cir. Tex. 2004)

United States v. Manfre, 368 F.3d 832, 2004 U.S. App. LEXIS 9162 (8th Cir. Ark. 2004)

United States v. Reyes, 362 F.3d 536, 2004 U.S. App. LEXIS 5833, 63 Fed. R. Evid. Serv. (CBC) 1278 (8th Cir. Mo. 2004)

Declarant's statements in private conversation with friend (state of mind)

Horton v. Allen, 2004 U.S. App. LEXIS 10377 (1st Cir. Mass. May 26, 2004)

Non-testifying co-defendants statements to neighbor (declaration against interest)

People v. Cervantes, 118 Cal. App. 4th 162

Unjoined co-perpetrator's statement to his cousin (declaration against interest)

State v. Rivera, 268 Conn. 351, 844 A.2d 191, 2004 Conn. LEXIS 129 (2004)

Unjoined co-perpetrator's statement to girlfriend (spontaneous statement/state of mind)

State v. Manuel, 2004 Wisc. App. LEXIS 454 (Wis. Ct. App. May 27, 2004)

Surveillance tapes (containing statements of co-conspirators)

United States v. Cozzo, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. Apr. 16, 2004)

NON - Testimonial Hearsay in Domestic Violence Cases

Victim statements to friends & family about fear of defendant, threats, prior abuse

Evans v. Luebbbers, 2004 U.S. App. LEXIS 11418 (8th Cir. Mo. June 10, 2004)

[similar statute to EC §1370]

Victims excited utterance to friend describing domestic violence

People v. Compan, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004)

Demons v. State, 277 Ga. 724, 2004 Ga. LEXIS 274, 2004

Victim's statements to doctor to obtain medical treatment

Bell v. State, 2004 Ga. LEXIS 417 (Ga. May 24, 2004)

(limited to statements that did not identify defendant as the perpetrator)

Statements given in response to police "preliminary investigatory questions

State v. Forrest, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 (N.C. Ct. App. 2004)

(asked at the scene of a crime shortly after it has occurred." distinguished from "interrogation")

Spontaneous statement made to police immediately after a rescue

Fowler v. State, 2004 Ind. App. LEXIS 1103 (Ind. Ct. App. June 14, 2004)

("can be considered "part of the criminal incident itself, vs. part of the prosecution that follows.")

NON – Testimonial Hearsay in Child Abuse Cases

Statement of child victim to executive director of the Children's Assessment Center
People v. Geno, 2004 Mich. App. LEXIS 1067 (Mich. Ct. App. Apr. 27, 2004)
(Witness had accompanied child to bathroom at child's request and asked "do you have an owie?" after observing blood on clothes) [Not designed to elicit evidence that defendant or any person had hurt child, witness not "government employee."]

Other NON – Testimonial Hearsay

911 recording by Victim of Crime

Leavitt v. Arave, 2004 U.S. App. LEXIS 11586 (9th Cir. Idaho June 14, 2004)
People v. Moscat, 2004 N.Y. Misc. LEXIS 231 (N.Y. City Crim. Ct. Mar. 25, 2004)
"A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.... A 911 call was simply not equivalent to a formal pretrial examination. If anything, it was the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry. Moreover, a 911 call could usually be seen as part of the criminal incident itself, rather than as part of the prosecution that followed, as many 911 calls were made while an assault was still in progress.")

911 call reporting ongoing crime

People v. Conyers, 2004 N.Y. Misc. LEXIS 597 (N.Y. Sup. Ct. May 10, 2004)
("The witness's intention in placing the 911 calls clearly was to stop the assault that was in progress and not to consider the ramifications of future proceedings.")

Autopsy evidence and report

Perkins v. State, 2004 Ala. Crim. App. LEXIS 87 (Ala. Crim. App. Apr. 30, 2004)
Smith v. State, 2004 Ala. Crim. App. LEXIS 93 (Ala. Crim. App. Apr. 30, 2004)

Victim statement, through interpreter, to police at hospital one hour after being stabbed during robbery.

Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. App. Austin May 20, 2004)

Other Crawford Issues:

Offered against defendant

United States v. Cuong Gia Le, 2004 U.S. Dist. LEXIS 7124 (E.D. Va. Apr. 23, 2004)

Redacted statement of non-testifying co-defendant offered against that defendant only does not implicate *Crawford*

Application to other Proceedings

Release Revocation Hearings

United States v. Barazza, 2004 U.S. Dist. LEXIS 9732 (S.D. Cal. May 17, 2004)

Crawford does not apply to release revocation hearings (where confrontation right derives from due process, not 6th amendment)

SVP Hearings

Commonwealth v. Given, 441 Mass. 741, 808 N.E.2d 788, 2004 Mass. LEXIS 283 (2004)

Crawford does not apply to hearings to determine sexually dangerous person status (civil commitment proceedings)

Motions to Suppress

People v. Gomez, 117 Cal. App. 4th 531

Hearsay involved in Harvey-Madden rule is not affected by *Crawford*.

No Application to Prosecution

Al-Amin v. State, 2004 Ga. LEXIS 413 (Ga. May 24, 2004)

Crawford does not apply where defendant is proponent of the evidence

Opportunity to Cross Examine

Cooley v. State, 2004 Md. App. LEXIS 83 (Md. Ct. Spec. App. May 27, 2004)

Witness lapse of memory does not amount to denial of cross-examination (prior inconsistent statements not affected by *Crawford*)

Clark v. State, 808 N.E.2d 1183, 2004 Ind. LEXIS 460 (Ind. 2004)

Crawford does not apply to prior inconsistent statements, since that exception requires that the declarant must testify or be able to testify and thus is subject to cross examination

Forfeiture of Confrontation Right

State v. Meeks, 88 P.3d 789, 2004 Kan. LEXIS 234 (Kan. 2004)

State v. Fields, 679 N.W.2d 341, 2004 Minn. LEXIS 269 (Minn. 2004)

Crawford does not abrogate Rule of forfeiture as it applies to testimonial hearsay (statements to police, grand jury testimony where declarant's unavailability is procured by defendant See *Crawford* at 1370)

CRAWFORD CHECKLIST

1) Does Crawford apply in this type of proceeding?

YES

NO → Traditional hearsay rules apply



2) Is the statement offered for a hearsay purpose?

YES

NO → No hearsay / Crawford analysis required



3) Does a hearsay exception apply?

YES

NO → Inadmissible



4) Is the declarant unavailable?

YES

NO → Traditional hearsay rules apply



5) Has defendant been unable to cross examine declarant?

YES

NO → Traditional hearsay rules apply



6) Is it testimonial hearsay?

YES

NO → Traditional hearsay rules apply



IT MUST BE EXCLUDED